IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 01/03/2012
RUTH A. WILLINGHAM, CLERK
BY: GH

SERGIO GONZALEZ, Plaintiff/Appellee/ Cross-Appellant, v. ECKLEY & ASSOCIATES, P.C., Defendant/Appellant/ Cross-Appellee.	1 CA-CV 10-0718 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-021330

The Honorable John Christian Rea, Judge

REVERSED AND REMANDED IN PART; AFFIRMED IN PART

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I R V I N E, Judge

¶1 The law firm of Eckley & Associates, PC ("Eckley") appeals from partial summary judgment entered in favor of Sergio

Gonzalez, in his claims for vicarious liability against Eckley for the malpractice of its former employee, attorney Raul Garza ("Garza"). Eckley challenges the trial court's rulings precluding evidence (1) that Gonzalez' current attorneys were non-parties at fault; and (2) that Eckley was unaware of the representation in the underlying action. Gonzalez cross-appeals from the entry of judgment as a matter of law dismissing its breach of contract claim against Eckley. Because Eckley's awareness of Garza's representation of Gonzalez was material to the question of vicarious liability, we reverse summary judgment on that issue and remand for further proceedings. We affirm the ruling precluding evidence of non-party fault based on the finding that default judgment was not void, and affirm the judgment against Gonzalez on the breach of contract claim.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In the underlying action, Gonzalez hired Garza to represent him in a dispute with his landlord over a commercial lease. During the time Garza represented Gonzalez, Eckley hired Garza as an associate attorney. Thereafter, Garza essentially abandoned the action, resulting in a default judgment against Gonzalez.

¶3 After discovering the default judgment against him, Gonzalez brought this malpractice claim against Garza and

Eckley. Gonzalez moved for partial summary judgment against Eckley on a theory of vicarious liability for Garza's malpractice. The trial court concluded that Garza's representation was within the course and scope of his employment and granted the motion.

¶4 Prior to trial, Eckley argued that Gonzalez' current attorneys were non-parties at fault for failing to file a motion to set aside the default. Gonzalez objected and sought to preclude evidence that his current attorneys drafted a motion to set aside that was not filed. The trial court precluded this evidence, ruling that a motion to set aside default would have been futile because (1) Garza had failed to file a mandatory response to an amended complaint in the underlying action, so default was not void as a matter of law; and (2) abandonment by an attorney is not grounds to set aside default based on excusable neglect under Rule 60(c).

¶5 During its opening statement, Eckley told the jury that it did not know Garza represented Gonzalez when it hired him or during his employment at Eckley. Later, Gonzalez' attorneys asked Gonzalez whether anyone at Eckley kept him informed of the litigation in this case. The next day, Eckley objected to these questions and asked to be allowed to present rebuttal evidence regarding its lack of knowledge that Garza

represented Gonzalez. The court denied Eckley's request and instructed both sides not to discuss whether Eckley knew Gonzalez was Garza's client.

¶6 The jury returned a verdict in favor of Gonzalez on the malpractice claim and awarded him $108,804.31 in damages. Eckley filed a timely notice of appeal. Gonzalez timely cross-appeals the denial of his breach of contract claim.

DISCUSSION

¶7 We review a trial court's grant of summary judgment de novo, viewing the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Link v. Pima County*, 193 Ariz. 336, 340, ¶ 12, 972 P.2d 669, 673 (App. 1998). A motion for summary judgment should only be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ariz.R.Civ.P. 56(c); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

1. Vicarious Liability for Garza's Actions

¶8 Eckley contends that the trial court erroneously relied on Restatement (Third) of Law Governing Lawyers § 58 (2000) ("Restatement § 58") to grant summary judgment on the issue of Eckley's vicarious liability for Garza's malpractice. Eckley contends Restatement § 58 is contrary to Arizona law.

¶9 The trial court did not state the legal basis for its ruling, but found that Garza "was acting within the ordinary course of business and scope of employment as a matter of law based on the undisputed facts." Eckley argues that the use of the phrase "ordinary course of business" suggests that the trial court was relying on Gonzalez' theory of vicarious liability under Restatement § 58(1), which states, "A law firm is subject to civil liability for injury legally caused . . . by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority."

¶10 The court's ruling, however, did not mention Restatement § 58. The trial court did not elaborate or otherwise address the traditional respondeat superior legal analysis under Arizona caselaw. *See* Restatement (Second) of Agency §§ 219, 228, 229, 235.

¶11 Regardless of the standard the trial court applied, we conclude that summary judgment was improper because there was a material question of fact regarding whether Garza was acting within the course and scope of his employment. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. "Whether an employee's tort is within the scope of employment is generally a question of fact. . . . It is a question of law, however, if the undisputed

facts indicate that the conduct was clearly outside the scope of employment." *Smith v. Am. Express Travel Related Servs. Co.,* 179 Ariz. 131, 136, 876 P.2d 1166, 1171 (App. 1994) (internal citations omitted).

¶12 There was no dispute that Garza was employed by Eckley to handle litigation matters; represented Gonzalez during the time he was employed by Eckley; represented Gonzalez during the same time and at the same place that he performed other acts relating to his employment with Eckley; and that while an employee of Eckley, Garza failed to properly represent Gonzalez resulting in a default judgment against Gonzalez. This evidence does not show, however, that Garza represented Gonzalez with the purpose of serving Eckley.

¶13 Only an employee's acts done in some part for the purpose of serving the employer fall within the scope of employment. *See* Restatement (Second) of Agency § 228(1)(c), cmt. a (1958). Comment a to Restatement (Second) of Agency § 235, similarly states:

> The rule stated in this Section applies although the servant would be authorized to do the very act done if it were done for the purpose of serving the master, and although outwardly the act appears to be done on the master's account. It is the state of the servant's mind which is material. Its external manifestations are important only as evidence. Conduct is within the scope of employment only if the servant is actuated

> to some extent by an intent to serve his master. However, it is only from the manifestations of the servant and the circumstances that, ordinarily, his intent can be determined. If, therefore, the servant does the very act directed, or does the kind of act which he is authorized to perform within working hours and at an authorized place, there is an inference that he is acting within the scope of employment.

¶14 Eckley provided evidence that it was unaware that Garza represented Gonzalez and that Garza denied representing outside clients. Eckley also provided evidence it never received any fees from Gonzalez; never agreed to represent Gonzalez; and none of its procedures for client engagement were followed. This evidence was sufficient to raise a question of material fact as to whether Garza represented Gonzalez in some part with the purpose to serve Eckley.

¶15 Gonzalez cites *Ohio Farmers Insurance Co. v. Norman,* 122 Ariz. 330, 594 P.2d 1026 (App. 1979), and *State v. Schallock,* 189 Ariz. 250, 941 P.2d 1275 (1997), for the position that an employee can act to serve his own purposes or commit a forbidden act while still acting within the course and scope of employment. These and the other cases that Gonzalez relies on are readily distinguishable.

¶16 In *Ohio Farmers*, there was no dispute that the employee's act of burning trash was performed to serve his employer even though the employer expressly had forbidden the

act. 122 Ariz. at 331-32, 594 P.2d at 1027-28. In *Dube v. Desai,* a university professor's tortious interference with a student's ability to obtain a doctorate was motivated in part by a desire to serve the university because the student provided evidence that the professor's remarks about the student's work were at least incidentally related to the professor's duty to comment on the student's dissertation. 218 Ariz. 362, 367-68, ¶¶ 17, 19, 186 P.3d 587, 592-93 (App. 2008). Because there was no contrary evidence to this material fact, summary judgment was appropriate. *Id.* at 367, ¶¶ 21-22, 186 P.3d at 591.

¶17 Similarly, both *Schallock*, 189 Ariz. at 257-58, 941 P.2d at 1282-83, and *Higgins v. Assmann Elec., Inc.,* 217 Ariz. 289, 296, ¶ 23, 173 P.3d 453, 460 (App. 2007), held that the scope of employment issue was a jury question. In *Higgins,* the supervisor's act of firing a subordinate appeared to further only the employee's interest. *Id.* at 297, ¶ 31, 173 P.3d at 461. Because the employer did nothing to rescind the supervisor's act, however, the court concluded that the employer affirmed the conduct and found it to be within the scope of his employment. *Id*. at 297-98, ¶ 33, 173 P.3d at 461-62.

¶18 Eckley has presented sufficient evidence to raise a question of fact as to whether Garza was acting with a purpose to serve it when he represented Gonzalez yet withheld any

payment and, arguably, intentionally hid the fact of this representation from Eckley. Eckley allegedly did not know of Garza's actions and, unlike *Higgins*, its lack of action does not suggest that Eckley validated or accepted Garza's acts as within the scope of his employment. *Id*. Eckley could not act to repudiate or remedy Garza's acts if it was unaware that he represented Gonzalez. Because the employee's state of mind is a material fact, *see* Restatement (Second) of Agency § 235, cmt. a., we hold the facts on this issue were disputed.

¶19 We therefore reverse the entry of summary judgment in favor of Gonzalez on the question of Eckley's vicarious liability and remand for a retrial of this issue before a finder of fact. In light of this decision, we conclude that the evidence relating to whether or not Eckley was aware that Garza represented Gonzalez is material to determining whether Garza was acting in the course and scope of his employment. The trial court erred in precluding this evidence from the jury, and it should be admitted on remand.

2. Default Judgment

¶20 In defending the allegation of malpractice, Eckley argued that Gonzalez' subsequent attorneys were non-parties at fault because they failed to move to set aside the underlying default judgment. Eckley argued that an answer to the amended

complaint was not required, so the default judgment was erroneously entered and, therefore, void. Thus, Eckley asserted that Gonzalez' attorneys should have filed a motion to set aside the void default judgment.

¶21 The trial court ruled that Arizona Rule of Civil Procedure ("Rule") 15(a)(3), requires an answer to an amended complaint in all cases. Thus, as a matter of law, a motion to set aside the default judgment would not have been granted, and Gonzalez' subsequent attorneys were not at fault for failing to file such a motion. Eckley challenges this ruling.

¶22 Eckley contends the amended complaint did not add any new claims or theories, just another defendant (Valencia) and additional factual allegations. Eckley argues that the additional facts were "minimal and unimportant" and no answer was required. Gonzalez, on the other hand, contends the additional factual allegations were not a "mere technicality" and required a response. The trial court viewed Rule 15(a)(3) as requiring a response in all circumstances. We agree with the trial court.

¶23 We review the interpretation of procedural rules de novo and "evaluate procedural rules using principles of statutory construction." *State v. Campoy*, 220 Ariz. 539, 544, ¶ 11, 207 P.3d 792, 797 (App. 2009). In reviewing a procedural

rule, our objective is to apply the intent of the Arizona Supreme Court. *Id.* The plain language of a rule is the "best indicator" of our supreme court's intent. *Id.* Therefore, if the language of the rule is clear and unambiguous, we give effect to that language and do not employ other methods of statutory construction. *Id.*

¶24 Rule 15(a)(3) provides: "A party *shall* plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." (Emphasis added.) The plain language of this rule suggests that a responsive pleading is mandatory. *See Ins. Co. of N. Am., v. Superior Court (Villagrana),* 166 Ariz. 82, 85, 800 P.2d 585, 588 (1990) (holding "[t]he use of the word 'shall' indicates a mandatory intent by the legislature.").

¶25 The history of Arizona Rule 15(a) supports this interpretation. The 1928 version of this rule read: "Where the defendant has answered, and the plaintiff shall afterward amend his pleading, the defendant need not answer a second time, but the original answer shall extend to such amended pleading, so far as applicable." 1928 Revised Code Arizona, § 3787. In 1939, the language was changed to read: "A party *shall plead* in

response to an amended pleading within the time remaining for response to the original pleading or within ten [10] days after service of the amended pleading, whichever period may be the longer*, unless the court otherwise orders*." Arizona Code Annotated § 21-448 (1939) (emphasis added). The inclusion of the phrase "shall plead in response" indicates a change to a mandatory pleading rule.

¶26 This phrase also distinguishes Arizona Rule 15(a)(3) from Federal Rule of Civil Procedure 15(a)(3), which states: "Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." The federal rule thus "provides a deadline for responding to an amended complaint (if a response is required), but does not state when a response is required . . . ." *Wagner v. Choice Home Lending,* 266 F.R.D. 354, 358 (D. Ariz. 2009).

¶27 Because the plain language of Arizona's Rule 15(a) required a timely response to the amended complaint, Garza's failure to file a timely response in the underlying action did not render default judgment void, nor could default have been set aside. Accordingly, we affirm the trial court's ruling precluding the evidence that other non-parties were at fault for

failing to file a motion to set aside the underlying default judgment.

3. Cross-Appeal

¶28 Gonzalez alleged that Eckley breached its contract by failing to answer the amended complaint in the underlying action. Having alleged that there was a contract claim in this matter, Gonzalez sought an award of attorneys' fees pursuant to A.R.S. § 12-341.01 (2003) and costs pursuant to § 12-341 (2003). At the close of evidence, Eckley made an oral motion for judgment as a matter of law on this breach of contract claim. Eckley argued there was no evidence that Garza or Eckley made a specific promise to Gonzalez, rather there was only evidence of a breach of an implied in law contract which gives rise to a tort claim and not a breach of contract claim. The trial court granted the motion on the breach of contract claim for reasons not stated in the record on appeal. Gonzalez cross-appeals from this ruling.

¶29 Gonzalez argues there was evidence that Garza promised to do whatever was necessary to properly represent him and protect his interests. He contends Eckley did not contradict this testimony, so his breach of contract claim should have gone to the jury. We disagree.

¶30 Gonzalez' actual testimony was that he "*expected* [Garza] to do whatever was necessary to properly represent [him] and protect [his] interest . . . ." (Emphasis added.) The only evidence Gonzalez offered pertained to his expectations regarding the representation. There was no evidence of a specific promise by Garza or Eckley to perform a particular act.

¶31 A breach of contract action against an attorney may exist if "the duty breached is not imposed by law, but is a duty created by the contractual relationship, and would not exist 'but for' the contract." *DeSilva v. Baker,* 208 Ariz. 597, 605, ¶ 32, 96 P.3d 1084, 1092 (App. 2004) (citation omitted). "Absent some special contractual agreement or undertaking between those in the professional relationship, therefore, a professional malpractice action does not 'arise' from contact, but rather from tort." *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 524, 747 P.2d 1218, 1223 (1987).

¶32 In this case, there was no evidence of a specific contractual agreement or undertaking by Garza, only the professional duties implied in law. Accordingly, we reject Gonzalez' attempt to reconcile this case with *Asphalt Eng'rs, Inc. v. Galusha*, 160 Ariz. 134, 138, 770 P.2d 1180, 1184 (App. 1989) (allowing an award of attorneys' fees pursuant to A.R.S. § 12-341.01(A) where "[t]he gravamen of the litigation rests in

[the attorney's] failure to perform services expressly promised under an oral contract."). Because the malpractice action arises in tort, we affirm the trial court's denial of the breach of contract cross-claim.

4. Attorneys' Fees

¶33 Both parties request an award of attorneys' fees arising from contract pursuant to A.R.S. § 12-341.01(A). Because we conclude that the malpractice action arises in tort, not contract, neither party is entitled to fees under A.R.S. § 12-341.01(A).

¶34 Eckley also argues that it is entitled to an award of costs incurred in responding to a frivolous cross-appeal pursuant to ARCAP 25. Although the cross-appeal was without merit, we cannot say it was frivolous. Therefore, we deny its request. *See Price v. Price,* 134 Ariz. 112, 114, 654 P.2d 46, 48 (App. 1982) (holding that an appeal that is without merit is not necessarily frivolous and sanctions under Rule 25 should be used "with great caution").

CONCLUSION

¶35 Because a question of fact exists as to whether Garza was acting within the "course and scope of his employment," we reverse the partial summary judgment against Eckley on the vicarious-liability issue and remand for further proceedings

consistent with this decision. We affirm the ruling regarding the non-party-at-fault issue. On cross-appeal, we affirm the judgment as a matter of law on the breach of contract claim.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
DANIEL A. BARKER, Judge

/s/
PATRICIA K. NORRIS, Judge